Supreme Court, U.S.
FILED
JUL 30 1993
OFFICE OF THE CLERK

No. 93-43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ILLINOIS CENTRAL RAILROAD,

Petitioner,

v.

CATHERINE C. MARTIN, as Special Administrator of the Estate of David Martin, Deceased,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

JAMES G. MEYER
Counsel of Record
A. MARK IALONGO
IALONGO & MEYER
225 West Washington Street
Suite 1014
Chicago, Illinois 60606
(312) 332-4701

Attorneys for Respondent

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. The Admission of the Testimony Concerning a Request for a Cost Estimate at the Industrial Street Crossing does not Violate the Provisions of 23 U.S.C. Sec. 409 and Is not in Conflict with Federal Decisions Interpreting that Statute	5
II. The Judgment of the Court Below Rests on Independent and Adequate State Law Grounds and Review by this Court Is Unnecessary	7
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	PAGE
Coleman v. Thompson (1991) 111 S.Ct. 2146, ___ U.S. ___	10
Downing v. United Auto Racing Assn. (1991) 211 Ill. App.3d 877, 570 N.E.2d 828	8
Herb v. Pitcarin (1945) 65 S.Ct. 459, 324 U.S. 117, 89 L.Ed. 789	10
Martin v. Illinois Central Gulf Railroad (1992) 237 Ill. App.3d 910, 606 N.E.2d 9	6, 9
Michigan v. Lang (1983) 103 S.Ct. 3469, 463 U.S. 1032, 77 L.Ed.2d 1201	10
Stembridge v. State of Georgia (1952) 72 S.Ct. 834, 343 U.S. 541, 96 L.Ed. 1130	10, 11
Zibler v. American Federation of Labor (1984) 105 S.Ct. 5, 468 U.S. 1310, 82 L.Ed.2d 896	10

Statute	
23 U.S.C. Sec. 409	1, 4, 5, 6, 10, 11

No. 93-43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ILLINOIS CENTRAL RAILROAD,

Petitioner,

v.

CATHERINE C. MARTIN, as Special Administrator of the Estate of David Martin, Deceased,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

23 U.S.C. Sec. 409 (emphasis added to that portion of the Statute omitted in Petition for Writ of Certiorari pages 3, 9).

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144 and 152 of this title *or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds* shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

STATEMENT OF THE CASE

The Petitioner's Statement of the Case omits crucial facts necessary to an understanding of the issues presented.

The Occurrence

Immediately before the accident David Martin was driving westbound on New Street, not speeding and making no unusual movements (R. Vol. II, 915, 938-939). New Street ran parallel to the defendant's double main tracks so that Martin's vehicle was always in front of, and visible to the Engineer of the train, which was approaching the vehicle from the rear at 54 m.p.h. (R. Vol. II, 913).

At all times before the accident the van was in front of the train and the train did not pass or come next to the vehicle (R. Vol. II, 915, 941). The Engineer watched the vehicle turn right from New Street onto Industrial Street and begin to cross the tracks; he was "going fairly easily" (R. Vol. II, 922). The Engineer estimated the vehicle's speed as 6 to 10 m.p.h. (R. Vol. II, 925).

A police officer testified that he was parked on New Street approximately one quarter mile east of the crossing at the time of the accident so that the train passed him before the accident and he did not recall hearing the train's horn. (R. Vol. II, 962, 985, 917).

Approximately two seconds before the impact with Martin's vehicle, the Engineer put the train in emergency stop and it took one quarter mile for the train to completely stop which, the Engineer testified, was normal and a "good stop." (R. Vol. II, 925-926).

The Wigwag Signal

Harold Michael, a registered professional engineer and teacher at Purdue University for 39 years, testified that the wigwag signal at the scene of the accident was not appropriate and ineffective (R. Vol. II, 1797); was obscured from a driver's vision by the way it was installed (R. Vol. II, 1807); and, that because the crossing had double main tracks, it warranted the installation of automatic gates and flashing lights. (R. Vol. II, 1776).

Bernard Morris, the Chief Railroad Engineer for the Illinois Commerce Commission ("ICC") testified that the ICC had various criteria for the installation of automatic flashing light signals ("AFLS") and gates at railroad crossings (R. Vol. II, 1145), but that the ICC only had authority to regulate "public crossings" and not privately owned crossings. (R. Vol. II, 1132). In 1981 if a private crossing had

double main tracks, in excess of 20 trains per day and 150 cars a day, the ICC could not require the installation of gates and AFLS (R. Vol. II, 1152) because the ICC did not have jurisdiction of private crossings (R. Vol. II, 1132). However, if the same crossing were a public crossing it would meet the criteria to install gates and AFLS. (R. Vol. II, 1153).

How Industrial Street Became a Private Crossing

Industrial Street has been publicly owned by the Village of Lemont, Illinois since 1913 (R. Vol. II, 1008). In 1974 a National Crossing Inventory was requested by the Federal Government wherein each railroad in the U.S. designated their own crossings as either "public" or "private." (R. Vol. II, 1133). The inventory forms were provided to the ICC, among others. ICC regulatory authority applies only to those railroad crossings in Illinois that were designated as public in the Crossing Inventory. (R. Vol. II, 1130) In 1981, at the time of the Martin accident, the records of the ICC contained the Inventory form showing the Industrial Street crossing to be designated as a private crossing by the defendant railroad (R. Vol. II, 1134).

Issues Made by the Pleadings

Both Counts I and II of the Complaint filed prior to trial alleged that on the date of the accident the Industrial Street crossing was a "public crossing" in that the street was open to public travel and under the jurisdiction of a public authority. The defendant denied that on the date of the accident Industrial Street was a public crossing. The Complaint also alleged that in 1974 the defendant completed a Crossing Inventory form for Industrial Street declaring it to be a "private crossing" and submitted that form to the ICC. The defendant denied that allegation.

SUMMARY OF THE ARGUMENT

The defendant's attempt to solicit this Court's jurisdiction is based only on one contention; that certain reports or data about increasing the level of signal protection at the Industrial Street crossing should not have been admitted into evidence in the trial court because of the provisions of 23 U.S.C. Sec. 409.

The defendant's Petition must fail for two reasons.

First, at the time of the accident and the time the objectionable evidence was being produced, the Industrial Street crossing was designated as a "private" crossing by the defendant railroad and the Illinois Commerce Commission. Federal-aid highway funds cannot be used for the safety enhancement of private crossings. Because 23 U.S.C. Sec. 409 specifically relates to construction ". . . which may be implemented utilizing Federal-aid highway funds. . .", the statute is inapplicable to this crossing at the time of the accident. Further, none of the cases cited by the defendant in support of its position deal with a private crossing and are therefore readily distinguishable from the instant case.

Second, the wrongful death jury verdict and judgment in this case is supported independently of any allegedly objectionable evidence, by adequate evidence of the defendant's negligent conduct. Therefore, any opinion regarding the federal statute in this case would amount to an advisory opinion. The defendant's delay in producing the cost estimate for improved protection at Industrial Street is, although clear evidence of the defendant's wrongful conduct, but a small portion of the evidence in the trial court.

The defendant has made no attempt to demonstrate that the judgment of the trial court would be different if the evidence had not been received. In fact, the Appellate Opinion is clear that the court affirmed the verdict as to Count I without reference to the objectionable evidence.

ARGUMENT

I.

The Admission of the Testimony Concerning a Request for a Cost Estimate at the Industrial Street Crossing does not Violate the Provisions of 23 U.S.C. Sec. 409 and Is not in Conflict with Federal Decisions Interpreting that Statute.

The Petition for Certiorari omits some significant evidence that relates to the issue of whether the prohibitory language of 23 U.S.C. Sec. 409 has been violated in this case.

As the petitioner acknowledges, 23 U.S.C. Sec. 409 is a part of a legislative package appropriating federal funds for highway construction and highway railroad crossing safety projects. (23 U.S.C. Sec. 101 et seq.) As Bernard L. Morris, the Chief Railroad Engineer for the Illinois Commerce Commission testified in the trial court, federal funds can be spent for the safety enhancement of publicly owned railroad crossings, not private crossings (R. Vol. II, 1138), and on the date of this accident the ICC recognized the Industrial Street crossing as a private crossing (R. Vol. II, 1134), which was outside its regulatory jurisdiction (R. Vol. II, 1130-32). The plaintiff alleged that the

Industrial Street crossing was a "public crossing" within the meaning of the rules and regulations of ICC, and had been such since 1913 (R. Vol. II, 1005-08), and further that it was the improper designation of Industrial Street as a "private crossing" by the defendant railroad in 1974 that caused this error.[1] (Amended Complaint, Count II). Further, based in part on Morris' testimony that in his 25 years with the ICC he had never seen a wigwag signal installed at a public crossing (R. Vol. II, 1144), it was the plaintiff's contention that the railroad's improper designation of this crossing as private was the reason the crossing was not properly guarded on the day of Martin's accident.

At the time of the accident, Industrial Street, a private crossing, was not eligible for ". . . any highway safety construction improvement which may be implemented utilizing Federal-aid highway funds. . ." (23 U.S.C. Sec. 409). Therefore, the provisions of Sec. 409 were inapplicable to Industrial Street by the very terms of the statute.

This fact also distinguishes the instant case from the cases cited by the railroad in support of its Petition.[2] In all of the cases cited by the railroad the crossings qualified for the use of federal funds and, as a result, came within the scheme of the federal highway aid plan.

---

[1] The railroad denied it had improperly designated the crossing as private, but also relied upon the fact that the crossing was private in support of its argument that it could do nothing about upgrading the protection at the crossing until the designation was changed from private to public. (*Martin v. Illinois Central Gulf Railroad* (1992) 237 Ill.App.3d 910, 915, 606 N.E.2d 9, 12).

[2] All of the cited cases were decided after the trial of the instant case and were therefore unavailable to the trial judge.

II.

The Judgment of the Court Below Rests on Independent and Adequate State Law Grounds and Review by this Court Is Unnecessary.

The Petition for Writ of Certiorari does not discuss evidence that demonstrates that, exclusive of the cost estimate evidence, there is adequate, unchallenged grounds that support the verdict and judgment.

Harold Michael, a Professional Engineer and teacher at Purdue University for 39 years, testified that the wigwag type signal that was present at the accident was an ineffective device to warn motorists of approaching trains. (R. Vol. II, 1805). The configuration of this particular intersection, with motorists approaching the crossing parallel to the tracks, means that a motorist is not directly across from the wigwag until he gets within 60 feet of it, which is too late to be effective (R. Vol. II, 1775, 1805-1807). The plaintiff further proved through Michael's testimony that wigwag signals have not been installed at grade crossings in the U.S. for several decades (R. Vol. II, 1793) and that the fact that this crossing had "double main tracks" was enough, by itself, to warrant the installation of gates and automatic flashing light signals (AFLS), using the hazard index analysis that was in use in Illinois at the time of the accident; and finally, that the gates and AFLS would correct the inability of approaching motorists to see the crossing (R. Vol. II, 1996-98).

As previously mentioned, Bernard Morris, Chief Railroad Engineer for the ICC, testified that in his 25 years on the job he had never seen a wigwag signal at a public crossing (R. Vol. II, 1141). He further testified that bells used with a wigwag signal were "pretty ineffective today" because of auto sound proofing, and the light used in the

wigwag was primarily to attract a motorist's attention during night time hours. (R. Vol. II, 1141, 1143).

Sylvanus Walker, the railroad's expert witness, agreed that wigwag signals have not been installed in the U.S. in the last 25 years. (R. Vol. II, 2013).

The Petition does not discuss the fact that exhibits introduced into evidence show that the wigwag signal at Industrial Street was incorrectly installed. The defendant's Exhibit 23 was a diagram showing the "standard drawing from standard assembly for an autoflag, wigwag for street type use" (R. Vol. II, 2039) which depicted the wigwag signal and the mandatory "Railroad Crossing" crossbuck sign attached to the same post, the crossbuck placed below the wigwag. Plaintiff's Exhibits 3 and 4 were photos of the crossing on the day of the accident clearly showing that the wigwag was not installed in this way. The photos show the wigwag signal was erected behind a separate post supporting only the "Railroad Crossing" crossbuck sign, thereby causing the wigwag to be obscured from a motorist's view approaching the crossing.

In support of her obligation under the Illinois case law to prove the railroad had "actual or constructive knowledge that its conduct posed a high probability of serious physical harm to others," (*Downing v. United Auto Racing Assn.* (1991) 211 Ill. App.3d 877, 884, 570 N.E.2d 828, 833), and was thus guilty of the "willful and wanton conduct" alleged in Count II, the plaintiff proved that the railroad made no additions or corrections to the crossing protection after they were aware of a previous auto-train collision.

Robert Zimmerman, the railroad's Claims Agent who investigated the Martin accident of December, 1981, testified that he also had investigated an accident involving a car driven by Thomas Weisinger that was struck by an

IC train at Industrial Street on April 21, 1979. Zimmerman determined that the direction of the Weisinger auto (westbound on New Avenue and then north on Industrial Street onto the crossing), and the direction of the train (westbound across Industrial Street) were the same directions that the vehicles traveled in the Martin accident. (R-1336-37) He further confirmed that the crossing protection at the crossing in the Weisinger accident was the same as existed at the time of the Martin accident. (R-1335) Zimmerman filed a report on the Weisinger accident, but to his knowledge the railroad had no department or individual that reviewed crossing safety in 1979 or 1981. (R-1351-52)

The Illinois Appellate Court concluded, after considering the evidence relating to the Count I allegations of negligence, that there was ". . . ample evidence in the record upon which a jury could find that defendant failed to act in a reasonably careful manner in providing protection at the crossing." *Martin v. Illinois Central Gulf RR*, 237 Ill. App.3d 910, 917, 606 N.E.2d 9, 13, this conclusion made without referring to or relying on the cost estimate evidence to support that finding. The Court also determined that the ". . . jury heard sufficient evidence to conclude that defendant was guilty of willful and wanton misconduct in maintaining its property in a dangerous condition." *Martin*, *supra* 237 Ill. App.2d 910, 917, 606 N.E.2d 9, 14. Because there can be but one recovery for this wrongful death, and because Illinois law provides that where there are separate verdicts on both negligence and willful and wanton counts the law presumes the defendant is liable for the more serious conduct, the Appellate Court, pursuant to Illinois Supreme Court Rule 366(a)(5) (Ill. Rev. Stat. (1991) Ch. 110A, Sec. 366 (a)(5)) entered judgment for the plaintiff on the willful and wanton verdict in the amount of $1,111,500 and vacated judgment

for the plaintiff on the negligence verdict.[3] Assuming, for the sake of this argument only, that the cost estimate evidence should not have been admitted at trial, the Record clearly demonstrates that the judgment is supported by substantial evidence of negligent and willful and wanton misconduct that is completely unrelated to the issue of federal statute. Under these circumstances, it is unnecessary for this Court to resolve any issue in regard to the federal statute (23 U.S.C. Sec. 409).

This Court has consistently refused to review state court decisions that would result in advisory opinions. *Herb v. Pitcarin* (1945) 65 S.Ct. 459, 463, 324 U.S. 117, 125-126, 89 L.Ed. 789 ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws (sic), our review could amount to nothing more than an advisory opinion.") *Coleman v. Thompson* (1991) 111 S.Ct. 2546, 2554, ____ U.S. ____, 115 L.Ed.2d 640, *rehearing denied* 1991, 112 S.Ct. 27, 115 L.Ed.2d 1109 ("Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.") See also, *Zibler v. American Federation of Labor* (1984) 105 S.Ct. 5, 468 U.S. 1310, 82 L.Ed.2d 896; *Michigan v. Lang* (1983) 103 S.Ct. 3469, 463 U.S. 1032, 77 L.Ed.2d 1201; *Stembridge v. State of Georgia* (1952) 72 S.Ct. 834, 837-838, 343 U.S. 541, 547-548,

[3] Two jury verdicts were returned in the trial Court, Count I in negligence and Count II in willful and wanton conduct, both in the same amount, $1,710,000. The jury found the plaintiff 44% comparatively negligent in Count I, reducing the damages to $957,600, and 35% comparatively at fault in Count II, reducing the damages to $1,111,500.

96 L.Ed. 1130 ("We are without jurisdiction when the question of the existence of an adequate state ground is debatable").

CONCLUSION

The petitioner has not met his burden of satisfying the requirements of Supreme Court Rule 10(b). This case does not present a conflict with decisions of other courts of appeal interpreting 23 U.S.C. Sec. 409 because none of the cases relied upon by the petitioner dealt with a non public, or private, railroad crossing that was not eligible for the use of federal aid highway funds at the time of the accident.

Additionally, the trial court Record clearly demonstrates that the judgment in this case rests upon principles of state tort law that adequately support the court's opinion and judgment independent of any issues related to 23 U.S.C. Sec. 409, or the cost estimate evidence.

For these reasons the Respondent, Catherine C. Martin, the Special Administrator of the Estate of David Martin, deceased, respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES G. MEYER
Counsel of Record
A. MARK IALONGO
IALONGO & MEYER
225 West Washington Street
Chicago, Illinois 60606
Attorneys for Respondent